Infra Quest Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KOTA BHARU) — CIVIL APPEAL NO MT(1) 16-NCVC-2–01 OF 2014
AHMAD BACHE JC
22 AUGUST 2016

Revenue Law — Income tax — Assessment — Respondent assessed income tax payable by appellant — Assessment included income tax payable for years 2003 and 2004 — Whether notices of assessment issued by respondent for years of assessment 2003 and 2004 time-barred — Whether respondent had proved negligence against appellant — Whether appellant entitled to claim capital allowance — Income Tax Act 1967

The appellant was in the business of providing the towers to telecommunication service providers ('the telcos') to affix their antennae to the towers. The appellant's income was derived solely from the business of renting those towers to the telcos. Following a desk audit, the respondent had assessed the tax payable by the appellant from the year 2003–2008. The appellant appealed to the Special Commissioners of Income Tax ('the SCIT') on the assessment on the ground that the respondent had claimed taxes for the years of assessment ('YA') 2003–2004 when those assessments were time-barred. The appellant further argued that it was entitled to claim the capital allowance from the YA 2003–2008 for the construction of the towers, as the towers were plants. The appellant's appeal to SCIT was rejected, hence the present appeal. The issues for court's decision were: (a) whether the notices of assessment issued by the respondent for YA 2003 and 2004 ('the impugned notices') were time-barred; (b) whether the respondent had proved negligence against the appellant; and (c) whether the appellant was entitled to claim capital allowance.

Held, allowing the appeal with costs of RM8,000 and setting aside the decision of the learned SCIT:

(1) The respondent had failed to establish negligence against the appellant on the balance of probabilities. The appellant had done diligently what the law expects of a reasonable person, and that the appellant did not 'omit to do something that a reasonable person would do'. There was no such failure to give any return or whatsoever as required by law, as it was clearly proven from the appellant's witness's ('AW1') testimony that the appellant had submitted its returns for the YA 2003–2004, and for that matter, within time. On the evaluation of the facts and the law pertaining to the issue of limitation, it was proved that the respondent did not lead

any evidence that the appellant was negligent. It followed that the impugned notices issued by the respondent for the years of assessment 2003–2004 were also wrong in law and, thus were time-barred (see paras 73–74, 76, 81 & 85).

(2) By applying 'functional test', the appellant's business income was derived from the licensing of the telecommunication service providers who had affixed their antennas on the telecommunication towers and without the towers, the business of the appellant could not function or be conducted. Thus, the court found that the telecommunication towers were plants. In consequence, the appellant was entitled to claim allowance from the years 2003–2008 (see paras 130–131 & 133).

[Bahasa Malaysia summary

Perayu adalah dalam perniagaan menyediakan menara kepada penyedia perkhidmatan telekomunikasi ('syarikat-syarikat telekomunikasi') untuk memasang antena mereka ke Menara. Pendapatan perayu berpunca hanya daripada perniagaan menyewa menara tersebut kepada syarikat telekomunikasi. Berikutan satu audit meja, responden telah menaksir cukai yang kena dibayar oleh perayu daripada tahun 2003–2008. Perayu merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') untuk penaksiran atas alasan bahawa responden telah menuntut cukai untuk tahun penaksiran (YA) 2003–2004 apabila penaksiran tersebut terhalang oleh had masa. Perayu seterusnya menghujahkan bahawa ia berhak untuk menuntut elaun modal daripada YA 2003–2008 untuk pembinaan menara, memandangkan menara adalah loji. Rayuan perayu kepada PKCP telah ditolak, maka rayuan ini. Isu untuk keputusan mahkamah adalah: (a) sama ada notis pentaksiran yang dikeluarkan oleh responden untuk YA 2003 hingga 2004 ('notis yang dipersoalkan') adalah terhalang oleh had masa; (b) sama ada responden telah membuktikan kecuaian terhadap perayu; dan (c) sama ada perayu berhak untuk menuntut elaun modal.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM8,000 dan mengetepikan keputusan 'PKCP yang bijaksana:

(1) Perayu gagal untuk membuktikan kecuaian terhadap perayu atas imbangan kebarangkalian. Perayu telah melakukan dengan teliti apa yang dikehendaki oleh undang-undang kepada seorang yang wajar, dan bahawa perayu tidak 'omit to do something that a reasonable person would do'. Tiada kegagalan sebegitu untuk memberikan apa-apa pulangan atau apa-apa seperti yang dikehendaki oleh undang-undang, memandangkan ia telah jelas dibuktikan daripada testimoni saksi perayu ('AW1') bahawa perayu telah menyerahkan pulangannya bagi YA 2003–2004, dan untuk perkara itu, dalam masa. Pada penilaian fakta dan undang-undang berkaitan isu had masa, adalah telah dibuktikan bahawa perayu tidak mengemukakan apa-apa keterangan bahawa perayu

adalah cuai. Ia diikuti bahawa notis yang dipersoalkan yang dikeluarkan oleh responden bagi tahun taksiran 2003–2004 juga adalah salah dari segi undang-undang dan oleh itu telah dihalang oleh had masa (lihat perenggan 73–74, 76, 81 & 85).

(2) Dengan mengguna pakai 'functional test', pendapatan perniagaan perayu berpunca daripada perlesenan penyedia perkhidmatan telekomunikasi yang telah memasang antena mereka pada menara telekomunikasi dan tanpa menara, perniagaan perayu tidak boleh berfungsi atau dijalankan. Maka, mahkamah mendapati bahawa menara telekomunikasi adalah loji. Akibatnya, perayu berhak untuk menuntut elaun daripada tahun 2003–2008 (lihat perenggan 130–131 & 133).]

Notes

For cases on assessment, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2573–2617.

Cases referred to

Benson (Inspector of Taxes) v Yard Arm Club Ltd [1979] STC 266; [1979] 53 TC 67, CA (refd)

Blyth v Birmingham Waterworks Co [1843-60] All ER Rep 478 (refd)

Broken Hill Proprietary Co Ltd v Federal Commissioner of Taxation (1968) 41 ALJR 377, CA (refd)

Chan Loo Khee v Lai Siew San & Ors [1971] 1 MLJ 253, FC (refd)

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Commissioners of Inland Revenue v Barclay, Curle & Co Ltd [1969] 45 TC 221, HL (refd)

Cooke (H M Inspector of Taxes) v Beach Station Caravans Ltd [1974] 49 TC 514, Ch D (refd)

Daphne v Shaw (H M Inspector of Taxes) (1926) 11 TC 256, KBD (refd)

Dixon (Inspector of Taxes) v Fitch's Garage Ltd [1975] 3 All ER 455; [1975] 50 TC 509, Ch D (refd)

Family Golf Centres Ltd v Thorne (Inspector of Taxes) [1998] STC (SCD) 106 (refd)

Imperial Chemical Industries of Australia & New Zealand Ltd v Federal Commissioner of Taxation (1970) 70 ATC 4024 (refd)

Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd [1982] 2 All ER 230, HL (refd)

J Lyons and Co Ltd v The Attorney-General [1944] 1 All ER 477; [1944] Ch 281, Ch D (refd)

Jarrold (H M Inspector of Taxes) v John Good & Sons, Ltd [1963] 40 TC 681, CA (refd)

Ketua Pengarah Hasil Dalam Negeri v Debir Desa Development Sdn Bhd (No R1–14–20 of 2007) (unreported), HC (refd)

Ketua Pengarah Hasil Dalam Negeri v MSDC Sdn Bhd [2001] 1 MLJ 92 (refd)
Ketua Pengarah Hasil Dalam Negeri v Resort Poresia Bhd Civil Appeal No J-01–577 of 2010 (unreported), CA (refd)
Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd [2013] AMTC 389; (2013) MSTC 30–054, CA (refd)
Leeds Permanent Building Society v Procter (H M Inspector of Taxes) [1982] 56 TC 293, Ch D (refd)
Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue [1986] 2 MLJ 161, PC (refd)
Lingfield Park (1991) Ltd v Shove (HM Inspector of Taxes) [2004] CA 89 (consd)
Munby v Furlong (H M Inspector of Taxes) [1977] 50 TC 491, CA (refd)
Schofield (H M Inspector of Taxes) v R & H Hall Ltd [1975] 49 TC 538, CA (refd)
Tropiland Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2010] MLJU 1345, HC (refd)
Wu Siew Ying v Gunung Tunggal Quarry & Contruction Sdn Bhd & Ors [1999] 4 MLJ 9, HC (refd)
Yarmouth v France [1887] 19 QBD 647, QBD (folld)
ZF v Comptroller of Income Tax [2010 SGCA 48, CA (refd)

Legislation referred to

Evidence Act 1950 s 101
Income Tax Act 1967 ss 91(1), (3), Schedules 3, 5

DP Naban(S Saravana Kumar with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.
Ahmad Tariq (Norsalwani and Ahmad Isyak Mohd Hassan with him) (Senior Counsel, Inland Revenue Board) for the respondent.

Ahmad Bache JC:

BACKGROUND FACTS LEADING TO THIS APPEAL

[1] Vide a notice of appeal dated 23 October 2013 the appellant ('the appellant/taxpayer') had appealed against the decision of the learned Special Commissioners of Income Tax ('the SCIT') dated 27 September 2013, who had decided in favour of the respondent, ie the Ketua Pengarah Hasil Dalam Negeri ('the respondent/revenue').

[2] The appeal was made, to this court by way of case-stated, dated 15 January 2014, filed by the SCIT, under para 34, Schedule 5 of the Income Tax Act 1967 ('Act 53') for the opinion of this court on questions of law.

[3] Hence, the legal issues for the determination of this court as stated by the

SCIT, were the same issues that were heard by the SCIT, namely:

(a) on the first issue of time bar:

> Whether the notices of assessment ('the impugned notices') issued by the respondent/revenue for the Years of Assessment 2003 and 2004 are time-barred?
>
> If s 91(3) of Act 53 is not satisfied, then the assessments are null and void and to be set aside.

(b) on the second issue of the entitlement of the appellant to claim capital allowance:

Whether the appellant/taxpayer is entitled to claim capital allowance:

(i) for the years of assessment ('YA') 2003–2004, if those assessment are not time-barred;

(ii) for the years of assessment 2005–2008,

on the capital expenditure incurred for the appellant/taxpayer's telecommunication towers ('the towers') that are built on the basis that the telecommunication towers are *plant of the appellants* (the central issue underpinning this appeal).

[4] On the first issue, the SCIT had decided that:

(a) the impugned notices for the YA 2003–2004 issued by the respondent/revenue were not time-barred.

(b) the respondent/revenue had the power to invoke s 91(3) of Act 53 to raise the assessments against the appellant/taxpayer for the YA 2003 and 2004 even though outside of the limitation period due to the negligence of the appellant/taxpayer in omitting to file correct returns by claiming wrongfully for the capital allowance for the towers it had built.

[5] On the second issue, ie the legal claim as to whether the appellant/taxpayer was entitled to claim the capital allowance for the towers, which it had built, were dealt with in entirety for the YA 2003–2008, of which the SCIT had decided that:

(a) the telecommunication towers were *premises* in which the business of the appellant were conducted' and *were not the apparatus* by which the business activities of the appellant were carried on. (Emphasis added.)

(b) the appellant *could not bring itself within the ambit of* Schedule 3 of Act 53, as the appellant *did not satisfy* the requirement that the telecommunication *towers were plant* in order to be entitled to claim capital allowance under the aforesaid provision. (Emphasis added.)

[6] Upon hearing the submissions of both parties, this court had allowed the appeal by the appellant/taxpayer, and had set aside the whole decision of the SCIT, and had answered the stated legal issues in the following terms viz:

(a) on the first issue of time bar — the impugned notices of assessment for the YA 2003–2004.

(i) this court had found the decision of the SCIT that, the impugned notices for the YA 2003 and 2004 were not time-barred, was wrong in law. In other words, the impugned notices *were indeed time-barred*; and

(ii) this court had found that the respondent/revenue *did not satisfy* s 91(3) of Act 53 ie the respondent/revenue had *failed to prove the negligence* of the appellant/taxpayer to submit the correct returns for the YA 2003–2004 and, therefore the impugned notices *were null and void, and hence was set aside* by this court.

(b) *on the second issue of the entitlement of the appellant/taxpayer to claim capital allowance for the appellant/taxpayer's plant ie the telecommunication towers for the YA 2003–2008.*

(i) this court had found that the appellant/taxpayer *was entitled* to claim capital allowance for the YA 2003–2004, as well as YA 2005–2008, as the capital expenditure which were incurred on the plant ie the towers, built by the appellant. Therefore, the decision of the SCIT that the appellant/taxpayer was not entitled to claim capital allowance was found to be wrong in law; and

(ii) this court had found that, the appellants/taxpayer had satisfied the requirement that *the telecommunication towers were indeed plant* (the central issue underpinning this appeal) with which the appellant/taxpayer had used for the purpose of its business of providing telecommunication towers. Consequently, the decision of the SCIT that the towers were not plant, but instead were premises were wrong in law. Accordingly, this court had decided that the impugned notices for the YA 2003–2008 were also null and void and had set them aside.

[7] The respondent/revenue was dissatisfied with the decision of this court, and had filed a notice of appeal to the Court of Appeal. Hence, this grounds for the aforesaid decision of this court.

INTRODUCTION

[8] The appellant/taxpayer is in the business of providing the towers to telecommunication service providers/companies ('the telcos') that provide telecommunication services to affix their antennae to the towers.

[9] The income of the appellant/taxpayer is derived solely from the business of renting those towers to the telcos.

[10] In the *year of 2010* following a desk audit, the respondent/revenue had assessed the tax payable by the appellant/taxpayer as per the impugned notices, viz:

Year of Assessment	Date	Assessment	Tax payable
2003	9 February 2011	Original	RM15,154
2004	9 February 2011	Original	RM35,656
2005	9 February 2011	Original	RM67,954
2006	9 February 2011	Original	RM800,638.12
2007	9 February 2011	Additional	RM1,588,4.48
2008	9 February 2011	Additional	RM2,787,412.52

[11] The appellant/taxpayer had appealed to the SCIT on the ground that the respondent/revenue had claimed taxes for the YA 2003 and 2004 when those assessments were time-barred and in addition, that it was entitled to claim the capital allowance from the YA 2003–2008 for the construction of the towers, as they were plant.

[12] As its appeal was rejected as alluded to earlier, hence this appeal before this court.

FACTS OF THE CASE

[13] The agreed facts agreed by the parties, as well as facts that were elicited from the witnesses of both the appellant ('AW1') and the respondent (RW1), and those found by the special commissioners, were as follows:

(a) the appellant/taxpayer was a wholly-owned subsidiary of Permodalan Kelantan Berhad, of which was wholly owned by Perbadanan Kemajuan Iktisad Negeri Kelantan (Kelantan State Economic Development Corporation), of which is the economic arm of the State Government of Kelantan;

(b) the appellant/taxpayer was in the business of providing telecommunication towers which were licensed to third party companies that provide telecommunication services for the latter to affix their antennas to the telecommunication towers;

(c) the appellant/taxpayer's customers include telecommunication service providers (telcos) such as Celcom (Malaysia) Bhd, Maxis Broadband Sdn Bhd, Digi Telecommunications Sdn Bhd, Packet One Networks

(Malaysia) Sdn Bhd, YTL Communications Sdn Bhd, Sapura Research Sdn Bhd, and Telekom Malaysia Bhd;

(d) presently, the appellant/taxpayer owned 193 telecommunication towers installed in the whole of the state of Kelantan. The telecommunication towers were constructed on land after the land test were conducted, and they were stationary;

(e) the *telecommunication towers* were all manufactured by third party manufacturers and *installed for the purposes of the appellant/taxpayer's business*. (Emphasis added.);

(f) the appellant/taxpayer's *business income was from the licensing of the telecommunication towers to telecommunication service providers*. The appellant/taxpayer was not liable for the failure of the equipment of the service providers' equipment installed on the towers. (Emphasis added.);

(g) the appellant/taxpayer did not carry on its business from the telecommunication towers constructed, and only carried out its business from its business premise at Lot 1045, Jalan Dato' Lundang, 15200 Kota Bharu, Kelantan;

(h) no staff, desk or office equipment was placed at the telecommunication towers and no correspondence directed to the appellant/taxpayer was posted to the telecommunication towers. The appellant/taxpayer's workers carried out maintenance works like painting, grass-cutting and other works from time to time at the telecommunication towers;

(i) the telecommunication towers help enhance telecommunication connectivity and coverage. AW1 emphasised that the telecommunication towers do not merely function to hold antennae. The telecommunication towers are *purpose manufactured towers for the appellant's business*. The telecommunication towers have no other purpose other than this. (Emphasis added.);

(j) RW1 during cross-examination agreed that he did not doubt the appellant's claim for capital allowance on the telecommunication towers and that the appellant had incurred the said capital expenditure.

(k) in claiming for capital allowance, the appellant sought professional advice from its tax agent, Wanaco Tax & Consulting Sdn Bhd. The appellant's tax agent acted independently and professionally; and

(l) the respondent disallowed the capital allowance claim because the telecommunication towers are not plant.

THE SUBMISSIONS OF THE APPELLANT/TAXPAYERS

Failure of the special commissioners to consider relevant evidence — The impugned notices for YA 2003–2004

[14] Under s 91(3), it was submitted by the appellant that it was the respondent who must prove negligence of the appellant/taxpayer.

[15] Section 91(3) of Act 53 reads:

> 91(3) The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> in connection with or in relation to tax, *may at any time* make an assessment in respect of that person for any year of assessment for the purpose of making good of any tax *attributable to the* fraud, wilful default or *negligence* in question.

[16] On the facts of this issue, the appellant/taxpayer had submitted that during cross-examination, RW1 (executive/assessment officer of the respondent/revenue) had admitted that the tax returns of the appellant/taxpayer for the YA 2003 and 2004 were filed on time, and that the appellant had made full and frank disclosure.

[17] It was also submitted that during cross-examination, RW1 admitted that the appellant was *not negligent*, of which fact even the SCIT had taken note. The appellant submitted that the respondent/revenue had merely claimed that the appellant was negligent but failed to lead any evidence to establish the same, and that the respondent did not put its case that the appellant was negligent to AW1 during cross-examination.

[18] However, the SCIT had perplexingly, the appellant submitted, took note of RW1's testimony *during re-examination* that the appellant was negligent and proceeded to state *that the credibility of the witness was not affected* and found that the appellant's witness was not called to give evidence on the issue of negligence. Thus, the appellant submitted, that the SCIT's conclusion that the appellant was negligent had been made in the absence of any founded particulars of negligence.

[19] The appellant had contended the mere fact that the appellant/taxpayer had claimed capital allowance cannot be equated with negligence. The respondent/revenue, the appellant submitted, must establish that the appellant/taxpayer did something a reasonable person in his position would not have done.

[20] With respect to the definition of negligence, the appellant had referred this court to the definition in *Black's Law Dictionary* which defined negligence as 'characterised by a person's failure to exercise the degree of care that someone

of ordinary prudence would have exercised in the same circumstance,' in the absence of the definition of negligence in Act 53. Accordingly, the appellant submitted, the respondent/revenue had failed to discharge its burden of proof to establish the negligence of the appellant/taxpayer.

[21] On many other scores, the appellant contended that it in fact, had proven otherwise, on the following bases amongst others:

(a) at all material times, the appellant/taxpayer took professional advice from a firm of professional; tax agent that was independent of the appellant/taxpayer;

(b) the appellant/taxpayer had provided full co-operation by duly providing all the documents requested by respondent/revenue;

(c) the appellant/taxpayer made full and frank disclosure of its tax treatment in relation to the capital allowance claim;

(d) *the details pertaining to the capital allowance claim were stated in tax computations* (Emphasis added.);

(e) the *tax returns (of the appellant/taxpayer) for the years of assessment 2003 and 2004 were filed within the prescribed statutory time frame* (Emphasis added.); and

(f) *there was no attempt by the appellant/taxpayer to evade or avoid tax*. (Emphasis added.)

On the capital allowance

[22] On the second issue, the appellant/taxpayer had contended that the SCIT had failed to take into account the totality of the documentary and oral evidence that were led before them, of which it was duty-bound to consider, such as:

(a) the appellant's proposal for the construction of the towers;

(b) the appointment of consulting engineer for the construction of towers for Maxis Communication Bhd;

(c) certificate of payment for consultancy works on towers owned by the appellant for Project BaU Maxis (Lata Rek site); and

(d) Maxis Communication Bhd, as an example, was clearly named as a telecommunication service provider in the drawings.

[23] The appellant submitted that the documents it submitted were more than sufficient to establish the expenditure incurred by the appellant which

they are entitled to claim capital allowances for the construction of the towers, ownership as well as the nature of the appellant's business and functions of the towers.

[24] Schedule 3 of the ITA 1967 provides:

> 1 Subject to this Schedule, *qualifying expenditure for the purposes of this schedule is qualifying plant expenditure* or qualifying building expenditure within the meaning of paragraphs 2 to 6.
>
> 2(1) Subject to sub-paragraph (2) and paragraph 67, *qualifying plant expenditure is capital expenditure incurred on the provision of* machinery of *plant used for the purpose of a business* ...

[25] The appellant had placed reliance on the case of *Yarmouth v France* [1887] 19 QBD 647 in which the 'apparatus test' (adopted by the courts in England and Malaysia) was propounded to determine whether an item was a plant.

[26] In that case, the oft-quoted dicta of Lindley LJ was referred to ie:

> There is no definition of plant in the Act; but in its ordinary sense; it includes *whatever apparatus is used by a businessman for carrying on his business,* — not his stock-in-trade which he buys or makes for sale; but all the goods and chattels, fixed or moveable, live or dead, *which he keeps for permanent employment in his business*. (Emphasis added.)
>
> (Therefore, to see whether an item was a plant is to determine if it is an apparatus used by the businessman for carrying on his business).

[27] The appellant submitted that there was no dispute that:

(a) the appellant had incurred the capital expenditure in commissioning the manufacturing and installation of the telecommunication towers;

(b) the appellant was the owner of the telecommunication towers; and

(c) the telecommunication towers were all installed in Malaysia.

[28] It was also submitted that there was no dispute that the primary activity of the appellant was to *conduct its business for the provision of towers* to be licensed to telcos who affix their antennae to the towers. Therefore, the towers were not the appellant's stock-in-trade. (Emphasis added.)

[29] In fact, as found by the SCIT, *the business income of the appellant was from the licensing of the towers to the telcos*. Thus, *the towers*, the appellant submitted, *were kept for the permanent employment* and the *carrying on of its business of providing telecommunication towers*. (Emphasis added.)

[30] The appellant submitted that if the SCIT had addressed its mind correctly on the totality of the evidence and the facts before them, *they would have found that the telecommunication towers were 'plant' by the terms of the documentary evidence adduced*, and that the appellant had incurred capital expenditure in the construction of the telecommunication towers.

[31] Further, the appellant submitted that the SCIT had failed to take into consideration other tests necessary to reach a proper conclusion, as was done in the *Tropiland* case, in which the court had tested whether a multi-storey carpark was merely a premise or a plant by applying the 'premises test,' 'the functional test,' 'business test' and the 'apparatus test' in arriving at its conclusion.

[32] On the case of the applicable tests to determine if the towers were plant, the appellant referred to the case of *Tropiland Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2010] MLJU 1345 particularly where Vazeer J had said:

> If the Special Commissioners had addressed their mind correctly to the totality of the evidence and facts before them they would have found that the multi-storey car-park is a 'plant'. I say this because by the terms of the privitisation agreement the appellant is given a year lease ... for the sole purpose and function of which shall be to service the users and occupiers of the Kompleks ... *The running of the car-park is the appellant's business*. Therefore, the building *essentially performs one primary function which is to provide the means by which the appellant derives its revenue*: and therefore in its ordinary sense, *it is an apparatus used by the appellant in carrying on its business*. Without this building the appellant cannot carry out the business of a multi-storey car park. (Emphasis added.)

[33] In addition to the facts of the towers as found in the agreed facts, the appellant submitted that it had also proved through the testimony of AW1, which was not challenged during cross-examination, and were also accepted by RW1 when the same was put to him during cross-examination, that amongst others:

(a) the telecommunication towers were manufactured according to the technical proposal provided by the telecommunication service providers. Generally, the technical proposal includes site details, equipment descriptions, infrastructure dimension, antenna, frequency of operation, power supply and civil mechanical and electrical requirements; and

(b) generally, the material for the telecommunication towers consists of hot dip galvanising steel structure. This material provided great strength and wind resistance. The material involved in manufacturing the telecommunication towers played an important role. The material chosen by the appellant were able to withstand strong wind and harsh weather.

[34] The appellant submitted that even applying the 'premises test,' as adopted in the case of *Ketua Pengarah Hasil Dalam Negeri v Resort Poresia Bhd* Civil Appeal No J-01–577 of 2010 ('*Resort Poresia*'), it is apparent that the telecommunication towers functioned as a plant rather than a premise *since the purpose, use, construction and nature of the towers are solely to affix the service operators' equipment and enhance telecommunication connectivity and coverage of the equipment installed*. Without these purpose-built towers, the appellant did not have any business tool to carry out its business and without these towers, the appellant would not have any income. (Emphasis added.)

[35] The appellant submitted that if one were to follow the respondent's contention, then the appellant would end up having 193 places of business as at the material time, the appellant owned and operated 193 telecommunication towers. In that respect, the appellant submitted, the respondent had failed to look at the entire business operations of the appellant's holistically, particularly on the purpose why the purpose-built telecommunications towers were needed and how it is to be operated.

[36] The appellant submitted the SCIT's selective application of solely the premises test had subsequently led to the erroneous conclusion that the towers were premises. The SCIT had failed to take into consideration other tests necessary to reach a proper conclusion.

[37] The appellant further submitted that even applying the 'setting test', as propounded in the case of *J Lyons and Co Ltd v The Attorney-General* [1944] 1 All ER 477; [1944] Ch 281, as the very construction and existence of the telecommunication towers are purpose-driven, and solely dictated by the nature of the appellant's trade of providing the towers to be licensed, and the fact that it is for the provision of such towers in the course of its business that the appellant incurred capital expenditure in the provision of these towers, it is submitted that the towers cannot be seen as a setting and rather, is specially designed and constructed for the appellant's business.

[38] The appellant submitted that the 'functional test' should be used as it had been adopted in cases such as *Tropiland Sdn Bhd* and *Ketua Pengarah Hasil Dalam Negeri v MSDC Sdn Bhd* [2001] 1 MLJ 92, which stated that 'the fundamental test is that an apparatus will constitute plant if it fulfills the function of plant, in that, it is the means by which a trading operation is carried out'.

[39] The appellant had also submitted that the SCIT's finding that the appellant had negligently claimed for capital allowance for 'plant' instead of 'industrial building' under para 63(d) of the Schedule 3 of Act 53 fell outside the case that were laid out before the SCIT.

THE SUBMISSIONS OF THE RESPONDENT/REVENUE

On the time-barred notices for YA 2003 and 2014

[40] The respondent submitted that it had agreed that the assessments were made after the expiration of six years and therefore were time-barred under s 91(1) of Act 53.

[41] It contended that the law on time bar was not made without exception as in certain circumstances, the respondent could still issue an assessment after the expiration of the time period. The exception on this, it contended, was provided under sub-s 91(3) of the ITA which provides:

> (3) The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> In connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good of any tax attributable to the fraud, wilful default or negligence in question.

[42] *Black's Law Dictionary* (8th Ed), defines negligent as:

> the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregardful of others' right.

[43] At the same time, Alderson B in an English case of *Blyth v Birmingham Waterworks Co* [1843-60] All ER Rep 478, had this to say about negligence:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate to conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

[44] The respondent/revenue submitted that the principle laid down in Blyth's case above was later referred and followed by the Federal Court in the case of *Chan Loo Khee v Lai Siew San & Ors* [1971] 1 MLJ 253 and also in a more recent case of *Wu Siew Ying v Gunung Tunggal Quarry & Contruction Sdn Bhd & Ors* [1999] 4 MLJ 9.

[45] The respondent/revenue submitted it must be noted that sub-s 91(3) of the ITA lays down three situations whereby an assessment can still be made even though the time limit has set in and these are in cases of:

A (a) fraud;

(b) wilful default; or

(c) negligence.

B **[46]** In determining whether the appellant had committed any one of the three,the court must look at the facts of the case as a whole. The particulars of negligence are set out in these relevant parts of the testimony of the respondent's witness, En Nik Ibrahim bin Nik Yusof, encl RW1S:

C 7. Adakah encik sedar bahawa taksiran bagi tahun 2003 dan 2004 telah dibangkitkan melebihi tempoh 6 tahun?

J: Ya, saya sedar. Saya telah membangkitkan taksiran bagi tahun taksiran 2003 dan 2004 di bawah peruntukan seksyen 91(3) ACP 1967.

D Saya mendapati Perayu telah cuai dalam menuntut elaun modal ke atas menara pemancar telekomunikasi kerana menara tersebut bukanlah sebuah loji dan jentera menurut peruntukan di bawah Jadual 3 ACP 1967.

Kecuaian Perayu ini hanya disedari oleh KPHDN setelah saya menjalankan audit meja ke atas perniagaan Perayu dengan meminta Perayu mengemukakan akaun E beraudit bagi tahun taksiran 2003 sehingga 2008.

Perayu sebenarnya tidak layak untuk menuntut elaun modal tersebut dan atas alasan ini KPHDN mempunyai kuasa untuk membangkitkan taksiran melebihi tempoh 6 tahun di bawah seksyen 91(3) ACP 1967.

F **[47]** In support of these particulars of negligence, the respondent/revenue submitted it was also a glaring fact that Mohd Ezanee bin Mohd Adam, the appellant's sole witness joined the company on 16 November 2005 and was not the one who prepared the returns for the years of assessment 2003 and 2004 G and hence was not the right person to give evidence on the issue of negligence. The only person who had that knowledge would be Azly Osman who signed the return forms on 7 September 2004 for the year of assessment 2003 (please see p 68 exh C1) and on 16 May 2004 for the year of assessment 2004 (p 78 exh C1).

H *On capital allowance*

[48] The respondent/revenue in his submission also quoted and referred to the decision in *Yarmouth v France*.

I **[49]** The respondent/revenue further submitted that it was decided in *Yarmouth v France* that the test to be adopted to determine whether a 'horse' was a plant, was to see whether the horse was an apparatus used by the

businessman for carrying on his business. This is commonly known as the 'apparatus test'. A

[50] The respondent/revenue further submitted that following the decision in *Yarmouth v France* the courts have further developed test other than 'apparatus' and 'premises' to determine whether a subject matter is a 'plant' as the following authorities would show: B

[51] It was held in *Benson (Inspector of Taxes) v Yard Arm Club Ltd* [1979] STC 266 at p 2660 that: C

> The term 'plant' was not a term of art but was to be interpreted according to its ordinary meaning in the context in which it was to be construed. To determine whether a structure which had been provided for the purposes of a taxpayer's trade was plant, *regard was to be had to the use which was made of the structure:* if the structure was something by means of which the business activities were in part carried on it was plant, but, *if it played no part in the carrying on of those activities but was merely the place within which they were carried on, it was not plant.* The test, the functional test, applied whether or not the structure was attached to the soil. The vessel and barge, although chattels and although used in connection with the business of the taxpayer company as restaurateurs, were not part of the apparatus employed in the commercial activities of the business, but *were merely the structure within which the business was carried on, and accordingly were not 'plant'* within s 18 of the 1968 Act ... D E

[52] The respondent/revenue submitted that the case of *Lingfield Park (1991) Ltd v Shove (HM Inspector of Taxes)* [2004] CA 89 demonstrates the application of the 'premises test' to determine whether the All Weather Track ('AWT') was a plant. In that case, Mummery LJ found that at p 95 as follows: F

> The 'business use test' and the 'premises test' were to be applied in determining whether or not the All Weather Track ('AWT') was plant. It was necessary to indentify the item in question, consider its use in the business and then to ask whether it functioned as plant or premises (*Wimpy International Ltd v Warland* [1989] BTC 58 applied). The only reasonable conclusion on a proper application of the premises test was that the AWT functioned as premises on or in which the trade was carried on. The purpose, use, construction and nature of the AWT were such that the AWT functioned as premises for horse racing, as did the grass race course running parallel with it. It would be inaccurate use of language to describe any of them as the means, apparatus, equipment or tool by which or with which the trade of organising and promoting horse racing was carried on. G H

I

[53] In *Lingfield Park*, the respondent/revenue submitted, it was clear that the AWT functioned as premises on which the business of the taxpayer as organiser and promoter of horse racing at Lingfield Park Racecourse was carried on. The purpose, use, construction and nature of the AWT for all intent

and purposes functioned as premises for horse racing. Therefore, they could not constitute as plants.

[54] Another important case was the case of *Family Golf Centres Ltd v Thorne (Inspector of Taxes)* [1998] STC (SCD) 106. An attempt was made by the taxpayer to claim capital allowance for golf course as a plant. The special commissioners held:

> While the greens were an important adjunct to the carrying on of the taxpayer company's business, so was the rest of the golf course. The greens were as much part and parcel of the golf course as were the fairways and the bunkers and the tee-greens; the course would be incomplete without them. It was not material that they could be separately by the club-a golf course. They were not a mere adjunct, for they were part of the essence of the taxpayer's company's trade. The greens in the instant appeal were part of the place where on the business was carried on. Accordingly, they did not qualify as plant under s 24.

[55] The respondent/revenue submitted that in the case of *KPHDN v Resort Poresia Sdn Bhd*, the Court of Appeal judges unanimously agreed to maintain the SCIT's decision that the taxpayer cannot claim capital allowance under Schedule 3 of the ITA on the expenses incurred for golf course-turfing and grass. Both the Court of Appeal and the SCIT found that the golf course was a premise in which the business of the taxpayer was carried on and was not a plant. It was clearly stated in the case stated by SCIT where:

> In this instant case the appellant's income comprised of golf membership fees other club operations income. The golf course especially the green were specially constructed for the purpose of the appellant's trade as a golf club. Thus, the greens were premises in which the membership fees were derived.
>
> Thus, based on the above facts and decisions, and apply to our current case, the golf course in which the turfing and grass was planted cannot be considered as a mean in which the business was carry out. Instead, the golf course was rather a premise within the business was carried out.
>
> Accordingly, we therefore unanimously dismiss the appeal and order that the relevant assessment are hereby confirmed.

[56] The respondent/revenue further submitted that the tax payer in the case of *Ketua Pengarah Hasil Dalam Negeri v MSDC Sdn Bhd* [2001] 1 MLJ 92 contended that capital expenditure incurred in constructing the training ground used for the purpose of the tax payer's business qualifies for capital allowance. In that case, the tax payer is licensed to operate a driving institute. The principal activities of tax payer is to carry on the business as driving school for motor cars, lorries, tractors and all other motor vehicles. The capital allowance on capital expenditure incurred on the training ground was

disallowed by KPHDN/revenue on the ground that it is not a qualifying plant expenditure.

[57] The SCIT allowed the appeal by the tax payer and found that the training ground is an apparatus used in the conduct of the activities of the trade. Furthermore, it is an integral part of tax payer's business. Therefore it is plant within the meaning of Schedule 3 of the ITA 1967. The High Court affirmed the decision. However it was reversed by the Court of Appeal which affirmed the revenue's view that it was not plant.

[58] The respondent/revenue referred to the appellant's contention that the telecommunication towers are the appellant' plant, ie the apparatus with which it conducts its business. The appellant also contended that its business is carried out with the telecommunication towers. To this, the respondent replied that in this case, the telecommunication tower functions as a premise for the appellant on which the business of the appellant as a provider and operator of telecommunication towers was carried on. It is an agreed fact that the appellant's principal activity consists of providing and operating telecommunication towers for rent to telecommunication companies.

[59] The appellant had also in its submission contended that the appellant did not carry on its business in the telecommunication towers. The respondent replied that the appellant has misconstrued the meaning of 'carry on business in' as referred to in cases which discusses the tests for determining of what is or is not a plant. In fact, the scope of that phrase should be looked at from the point of view of the cases which has discussed it. The respondent/revenue argued, the courts were for example in *MSDC* or *Resort Poresia*, when considering the premises in which the business is conducted was not referring to the set up of an office of a business but rather to where the trade was carried on. They were not looking at the premises in which the business is conducted by considering whether there were office equipment set up at the premise in issue or whether staffs were working there or even whether the premises in issue was used as an address for correspondences.

[60] The respondent/revenue further argued that a line should be drawn between this appeal and the Court of Appeal's decision in the case of *Ketua Pengarah Hasil Dalam Negeri v Tropiland Sdn Bhd* [2013] AMTC 389; (2013) MSTC 30-054. On this point the respondent submitted that the Court of Appeal in making its decision, agreed with the approach of the High Court in determining whether the multi storey car park was to be regarded as a tool of the tax payer's trade or a mere setting. The High Court decided the appeal before it by looking at the peculiarity of fact and the service industry which the tax payer was involved in.

A DUTY OF THE APPELLATE COURT WHEN HEARING AN APPEAL BY WAY OF A CASE STATED

[61] In adumbrating the scope of the jurisdiction of this court pertaining to taxation case-stated, this court referred to the words of Vazeer Alam Mydin Meer JC (as he then was) in the case of *Tropiland Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2010] MLJU 1345 in which His Lordship had referred extensively to the established propositions of law as laid down in several leading case authorities.

[62] His Lordship said:

> The law relating to the appellate function of the High Court in matters pertaining to taxation cases stated by the Special Commissioners has been laid down in several leading case authorities. Edgar Joseph Jr SCJ speaking for the Supreme Court in the case of *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 had this to say on the role and appellate function of the High Court in taxation appeals:
>
> > First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison*, regarding the duty of the court when hearing appeals from commissioners in tax cases. It will be recalled that in that case what Lord Radcliffe said (at pp 35–36) was this:
> >
> > > I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them.
> > >
> > > In *Chua Lip Kong v Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:
> > >
> > > … it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. It is a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

[63] This court took guidance from the above passages as to the courts' appellate function in this instant case. In scrutinising the case stated by the Special Commissioners ('SCIT') this court also took the advise of Lord Diplock in the Privy Council case of *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 at p 236:

> Their Lordships cannot stress too strongly how important it is that, in every case stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated, but in that event it will be necessary for the case to be remitted to the commissioners themselves for further findings. It is the primary facts so found by the commissioners that they should set out in the case stated as having been 'admitted or proved'.
>
> From the primary facts admitted or proved the commissioners are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are as unassailable as the commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts.

[64] Further, in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] 2 MLJ 161, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners and this is what His Lordship had said at p 169:

> The special commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In Their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.

FINDINGS OF THIS COURT

On the first issue of time-barred notices of assessment and whether the respondent/revenue had proved negligence

[65] At this juncture, reference must be made to s 91(3) of Act 53 pursuant to which the impugned notices were issued:

> (3) The Director General where it appears to him that —

A

(a) any form of fraud or willful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may *at any time* make an assessment in respect of that person for any year of assessment for the purpose of making good of any tax attributable to the fraud, wilful default or negligence in question.

[66] With respect to the definition of negligence, both the appellant/taxpayer and the SCIT have relied on the *Black's Law Dictionary* and the *Strouds Judicial Dictionary of Words and Phrases* which define negligence, respectively, as follows:

Characterised by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstances; and

Negligence is the omitting to do something that a reasonable man would do, or the doing of something which a reasonable man would not do ... (per Alderson B in *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781; (1856) 25 LJ Ex 212).

[67] In view of the absence of the definition of negligence in Act 53, this court had relied on the definition of negligence as in the *Black's Law Dictionary*, (3rd Ed), *British Tax Library* and the *Stroud's Judicial Dictionary* ie the test of what a reasonable man would do or not do.

[68] This court had taken note of the SCIT's reference to the *Whiteman on Income Tax* which defined 'neglect' as meaning 'the negligence or *failure to give* any notice, return ... or other information required by the Income Tax Act'. (Emphasis added.)

[69] Thus, on a literal interpretation of s 91(3), this court held the view that negligence was one of the grounds upon which the respondent/revenue may make an assessment, or an additional assessment, *at any time*, for the purpose of making good any loss of tax attributable to such negligence. Hence, this court opined, that the Parliament has intended that the respondent/revenue is *not to be restrained by any limitation period* if the respondent/revenue is required to issue such additional assessment for purposes of making good any loss of tax. (Emphasis added.)

[70] On the aspect of burden of proving negligence, this court held the view that, consistent with the provision of s 101 of the Evidence Act 1950 (Act 56), the burden of proving negligence is placed on the DGIR, as borne out by the words 'The Director General *where it appears to him* ...'.

Section 101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[71] This court had also referred to the case of *Ketua Pengarah Hasil Dalam Negeri v Debir Desa Development Sdn Bhd* (No R1–14–20 of 2007) where it was held that the respondent/revenue must prove the negligence of the taxpayer.

[72] Hence, it was the finding of this court that on an evaluation of the facts and the law pertaining to the issue of negligence, it was proved that the respondent/revenue did not lead any evidence that the appellant/taxpayer was actually negligent. This court opined that mere act of the appellant claiming capital allowances could not amount to negligence.

[73] Upon analysis of the facts, this court had found that the respondent/revenue had failed to establish negligence against the appellant/taxpayer on the balance of probabilities. Instead, this court after critical analysis of the available evidence both oral and documentary, was satisfied that the appellant/taxpayer had led evidence to prove otherwise and successfully proved that:

(a) at all material times, the appellant/taxpayer took professional advice from a firm of professional; tax agent that was independent of the appellant/taxpayer (refer answer 31 of AW1 testimony);

(b) the appellant/taxpayer had provided full cooperation by duly providing all the documents requested by the respondent/revenue (refer answer 34 of AW1 testimony);

(c) the appellant/taxpayer made full and frank disclosure of its tax treatment in relation to the capital allowance claim (refer answer 35 of AW1 testimony);

(d) the details pertaining to the capital allowance claim were stated in tax computations (refer answer 35 of AW1 testimony);

(e) the tax returns for the years of assessment 2003 and 2004 were filed within the prescribed statutory time frame (refer answer 38 of AW1 testimony);

(f) the respondent/revenue gave no reasons at all to justify the basis for raising the time-barred assessments nor did it give the opportunity to the appellant to explain otherwise (refer answer 39–40 of AW1 testimony);

(g) the appellant only learned the reasons for the time-barred assessment in the course of the hearing before the SCIT when RW1 testified (refer answer 41 of AW1 testimony);

(h) there was no attempt by the appellant/taxpayer to evade or avoid tax. The appellant was a good corporate taxpayer. The appellant had always ensured that the payable taxes were duly paid, including the disputed assessment of the tax payable in this case (refer answer 33 of AW1 testimony); and

(i) the appellant had never been investigated or reprimanded by the respondent in the past (refer answer 33 of AW1 testimony).

[74] Hence, in accordance with the definition of negligence as provided in the references alluded to above, this court had found that the appellant/taxpayer had done diligently what the law expect of a reasonable person, and that the appellant/taxpayer did not 'omit to do something that a reasonable person would do'.

[75] Additionally, this court had also noted that, during cross-examination, RW1 had admitted that the appellant/taxpayer was not negligent. This was in line with the learned SCIT's finding during cross-examination that the appellant/taxpayer was not negligent.

[76] Going by the definition of negligence of Whiteman as applied by the SCIT, this court had found that there was no such failure to give any return or whatsoever as required by law, as it was clearly proven that the appellant had submitted its returns for the YA 2003–2004, and for that matter, within time.

[77] Further, and in addition, the finding of the SCIT was wrong when it equated the act of claiming capital allowance with negligence. This could be seen at p 24 of the case-stated (court encl 3) where it stated that:

> in this case, the appellant had submitted that it had filed its returns within the time stipulated but that is not the issue here. From the contemporaneous documents filed in Exhibit C1 it is clear that the appellant had omitted to submit its returns correctly and had claimed that the expenditure that it had incurred in building the telecommunication tower is plant when the telecommunication tower is clearly not 'plant'. (Emphasis added.)

[78] This was because whether an item was a plant or not is a question of law. The SCIT was correct when it stated at p 23 of the case stated (court encl 3) that:

The issue of whether the appellant had been negligent or not in the submission of its returns cannot be based solely on the views of RW1 or AW1 and whether the assessment is barred by limitation is essentially a legal issue as held by His Lordship Arulanandom J in *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131 at p 132. It must, hence, be an assessment based on the law whereby the facts of the case must be looked at in totality and not be based on the opinion of the lone officer of the respondent or the appellant's witness.

[79] This court agreed that the determination of the said claim could not hinge on the evidence of AW1 or RW1 alone. As it is a question of law, it must be evaluated on the basis of the facts in totality as gleaned from all the available evidence that had been adduced.

[80] Hence, whether the towers were a 'plant' or 'premise' was a question of law to be decided upon by the court and not the respondent/revenue as will be discussed in the second part of the judgment of this court. Thus, the fact that the appellant submitted the tax returns for YA 2003 and 2004 and claimed for capital allowance, on the basis that the telecommunication towers are 'plant', did not mean that the appellant was negligent. Thus, based on the facts on the issue of negligence, this court had found that the respondent/revenue failed to establish that the appellant/taxpayer did something a reasonable person in his position would not have done.

[81] Further, it was the finding of this court that on an evaluation of the facts and the law pertaining to the issue of limitation, it was proved that the respondent/revenue did not lead any evidence that the appellant/taxpayer was negligent.

[82] Hence, in accordance with the definition of negligence as provided in the references alluded to above, this court had found that the appellant/taxpayer had done diligently what the law expect of a reasonable person, and that the appellant/taxpayer did not 'omit to do something that a reasonable person would do'.

[83] Additionally, this court had also noted that, during cross-examination, RW1 had admitted that the appellant/taxpayer was not negligent. This was in line with the learned SCIT's finding during cross-examination that the appellant/taxpayer was not negligent.

[84] For the reasons given above, this court found that the finding of the learned SCIT ie that there was negligence on the part of the appellant, was wrong in law. Hence, in the absence of evidence of negligence, this court found

A the respondent/revenue had failed to prove the requisite elements of negligence and that the appellant had successfully proved otherwise, and thereby reversed the finding of the SCIT.

B **[85]** Therefore, it followed that the impugned notices issued by the respondent/revenue for the years of assessment 2003–2004 were also wrong in law and, thus were time-barred. The respondent/revenue's time-barred assessments were therefore null and void and should accordingly be set aside.

C *On the second issue of whether the appellant/taxpayer was entitled to claim capital allowance*

[86] To start with, reference is hereby made to the Schedule 3 of Act 53 viz:

D SCHEDULE 3: Capital Allowances and Charges

[Section 42]

Capital Allowances and Charges

Qualifying expenditure

E 1. Subject to this Schedule, qualifying expenditure for the purposes of this Schedule is qualifying plant expenditure or qualifying building expenditure within the meaning of paragraphs 2 to 6.

F 2. (1) Subject to subparagraph (2) and paragraph 67, qualifying plant expenditure is capital expenditure incurred on the provision of machinery or plant used for the purposes of a business, including —

a) ...

b) ...

G **[87]** This court had followed the test as propounded in *Yarmouth v France* [1887] 19 QBD 647 where Lindley LJ said at p 658:

H There is no definition of plant in the Act but in its ordinary sense it includes whatever apparatus is used by a businessman for carrying on his business — not his in trade which he buys or makes for sale, but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business.

I **[88]** The court in that case held that the horse which injured the plaintiff who was the employee of the defendant is a plant used in the business of the defendant. The plaintiff was therefore entitled to the compensation.

[89] The court noted that the test to be adopted to determine whether a 'horse' was a plant, was to see *whether the horse was an apparatus used by the*

businessman for carrying on his business. This is commonly known as the 'apparatus test'. (Emphasis added.)

[90] Thus, this court noted that as submitted by the respondent/revenue in Yarmouth, the horse qualified as a plant because:

(a) it was an apparatus which includes 'all goods and chattels'

(b) it was kept 'for permanent employment' in the business; and

(c) plant was an apparatus.

[91] This court also noted that following the decision in *Yarmouth*, the courts in Malaysia and other jurisdictions have further developed various test other than 'apparatus' to determine whether a subject matter is a 'plant'.

[92] This court also had noted the submission of the respondent/revenue that it was held in *Benson (Inspector of Taxes)Yard Arm Club Ltd* [1979] STC 266 at p 266 that:

> The term 'plant' was not a term of art but was to be interpreted according to its ordinary meaning in the context in which it was to be construed. To determine whether a structure which had been provided for the purposes of a taxpayer's trade was plant, regard was to be had to the use which was made of the structure: if the structure was something by means of which the business activities were in part carried on it was plant, but, if it played no part in the carrying on of those activities but was merely the place within which they were carried on, it was not plant. The test, the functional test, applied whether or not the structure was attached to the soil.

[93] This court had also considered the submission of the respondent whereby the case of *Lingfield Park (1991) Ltd v Shove (HM Inspector of Taxes)* [2004] CA 89 had demonstrated the application of the 'premises test' to determine whether the All Weather Track (AWT) was a plant. In that case, Mummery LJ found that at p 95 as follows:

> 'The 'business use test' and the 'premises test' were to be applied in determining whether or not the All Weather Track (AWT) was plant.

[94] The court also noted the submission of the respondent/revenue that in *Lingfield Park*, it was clear that the AWT functioned as premises on which *and not with which* the business of the taxpayer as organiser and promoter of horse racing was carried on at Lingfield Park Racecourse. The purpose, use, construction and nature of the AWT for all intent and purposes functioned as premises for horse racing. Therefore, they cannot constitute as plants.

[95] This court also noted the case of *Family Golf Centres Ltd v Thorne*

(Inspector of Taxes) [1998] STC (SCD) 106 where the taxpayer's claim for capital allowance on golf course was unsuccessful because it was held not to be a 'plant'.

[96] This court however had noted other authorities and made critical analysis of their decisions.

[97] In *Jarrold (H M Inspector of Taxes) v John Good & Sons, Ltd* [1963] 40 TC 681, the revenue's contention that moveable office partitions provided the setting for the trading activity and were not plant was not accepted by the court. They were found to be plant. The court held that the partitions provided the flexibility of accommodation which was a commercial necessity for the taxpayer.

[98] In *Daphne v Shaw (H M Inspector of Taxes)* (1926) 11 TC 256, it was held that books forming part of the law library of a solicitor were not machinery or plant on the grounds that they were not apparatus or implements used in carrying out an operation of the vocation. Fifty years later, the question of whether professional books purchased by a professional man would qualify as plant was re-considered by Mr Justice Fox in the case of *Munby v Furlong (H M Inspector of Taxes)* [1977] 50 TC 491 who said:

> I would take the view that the taxpayer is right and that these books are plant. It seems to me that they do fall within Lindley LJ's definition ...
>
> Those books do indeed represent apparatus used by him for carrying on his profession, and that to my mind is the end of the case.
>
> Thus, law books and law reports used by a barrister were held to be plant.

[99] Another important test formulated by the courts is the 'functional test'. The 'functional test' is based on the concept that to be a plant, an asset must actually perform some function, whether active or passive, for the carrying on of the tax payer's trade.

[100] In the case of *Benson (Inspector of Taxes) v Yard Arm Club Ltd* [1979] STC 266; [1979] 53 TC 67, Buckley LJ said:

> The function test provides the criterion to be applied. Is the subject matter the apparatus or part of the apparatus employed in carrying on the activities of the business ...
>
> On the other hand, the 'Setting Approach' implies that an asset that is merely a setting from which the business is carried on is not plant'.

[101] In the case of *Cooke (H M Inspector of Taxes) v Beach Station Caravans Ltd* [1974] 49 TC 514, the question raised was whether a swimming pool

could be a 'plant'. The facilities offered by the caravan park operator included swimming pools which came with an elaborate system of filtering, chlorinating and heating. The cost included concreting and lining the pools as well as the surrounding terrace. The Revenue refused to admit the expenditure as qualifying 'plant'. On appeal, the Chancellery division held that the whole structure was expenditure on plant and machinery. The decision in *John Good* and *Barclay, Curle* was applied.

[102] In that case, the 'functional test' was applied, and in the words of Megarry J:

> ... Nobody could suggest that the principal function of the pool was merely to protect the occupants from the elements ... they are part of the apparatus used by the company for carrying on its business as caravan park operators. The pool was part of the means whereby the trade is carried on and not merely the place at which it is carried on.

Here, the pool was considered not on its entirety but in relation to the business carried on it.

[103] In *Dixon (Inspector of Taxes) v Fitch's Garage Ltd* [1975] 3 All ER 455; [1975] 50 TC 509, the dispute was in respect of the canopy over the garage service area. In this case, the service area of a petrol filling station was protected by a metal canopy. The canopy was held not to be machinery or plant. The application of the functional test is dealt with by Brightman J in the following words:

> The proper test is whether the canopy had a functional purpose to enable the taxpayer company to perform the activity of supplying petrol to motor vehicles. I ask myself, 'does the canopy help to supply petrol', or is it merely part of the setting where petrol is supplied? To use the words of Lord Reid, which I have already read, is the canopy part of the means by which the operation of supplying petrol is performed? In my judgment this question admits only of a negative answer. The petrol pumps would deliver petrol to vehicles whether or not there was a canopy overhead. The canopy merely makes the business of supplying petrol more comfortable for motorists and the staff of the petrol station. It does not help to deliver the petrol. It is not part of the means by which it is supplied.
>
> It is not like the dock case, where the dock was useless without its operation machinery and vice versa or the silo case, where the silo and its contents were totally interdependent. Further, there is a clear thread running through the recent cases including Australian cases referred to in the silo case, showing that a structure is not plant if its only purpose is to provide shelter and if it plays no part in what may be termed 'the commercial process'. That conclusion is, I think an inevitable result of the application of the functional test. In this difficult area of the law it is, in my view, important to stick to the established test.

[104] The taxpayer argued that the canopy was an essential features to a modern petrol station and formed part of the 'apparatus' of the trade. It was held that it's function was not supplying petrol but merely gave protection from the weather and comfort to the customers. Hence it was not plant.

[105] In *Imperial Chemical Industries of Australia & New Zealand Ltd v Federal Commissioner of Taxation* (1970) 70 ATC 4024 it was held that the acoustic ceilings and electrical installations in two open-plan offices were not considered to be plant. They were held to be part of the premises. The court held that in using the 'functional test' they did nothing for the business that they would not do for the business of any other occupier.

[106] This court also had referred and analysed the decision in *Leeds Permanent Building Society v Procter (H M Inspector of Taxes)* [1982] 56 TC 293. The fact of the case was that the building society installed decorative screens in the windows of its branch offices. The screens were designed to be 'eye-catching' in order to attract members of the public into its branches. The screens were free-standing inside the branch windows and were readily removeable. It was accepted that high-level fascia signs and projecting signs were plant. The Crown argued that the screens were part of the setting and did not attract capital allowances. It contended that the attracting of customers was not of itself a sufficient *business function* and that items used to make the setting of a business more attractive do not satisfy the functional test to qualify as plant unless either providing an attractive setting was part of the trade processes or the form of attraction was dictated by the nature of the trade processes.

[107] It was held that the screens qualified as plant. The screens were not part of the setting; they were not part of the structure of the branch and could not be used for any other business without considerable modification. The screens were part of the shop furniture and *performed a function in relation to the business*, ie attracting business.

[108] In *Schofield (H M Inspector of Taxes) v R & H Hall Ltd* [1975] 49 TC 538, it was held that expenditure on concrete silos for holding grain in a particular position to facilitate delivery was held to be expenditure on plant. A distinction was made between the above function and merely storing the grain. The silos performed an active role. The silos were in the nature of a tool in the trade.

[109] In *Commissioners of Inland Revenue v Barclay, Curle & Co Ltd* [1969] 45 TC 221, a company of shipbuilders and repairers constructed a dry dock. The entire expenditure was held to be on plant or machinery on the grounds that the dock was not a passive receptacle for ships in repair, but it performed an active role in getting the ship from the river, securing it while under repair and

returning it to the river. It was unrealistic to consider the concrete work in isolation from the rest of the dry dock. The Revenue had accepted that the dock gates, operating gear, pumping installation, etc were machinery or plant. In delivering judgment, Lord Reid said:

> It seems to me that every part of this dry dock plays an essential part in getting large vessels into position where work on the outside of the hull can begin and it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock, is, I think, the means by which or plant with which, the operation is performed.

[110] This court had also looked at another test called the 'building test' within the 'functional test'.

[111] On the issue of buildings being considered as plant, a number of Australian cases have been considered by the courts. In *Broken Hill Proprietary Co Ltd v Federal Commissioner of Taxation* (1968) 41 ALJR 377 in holding buildings used in mining operations to be plant, Kitto J said the word 'plant':

> ... includes every chattel or fixture which is kept for use in the carrying on of the mining operations not being (in the case of a building) merely in the nature of a general setting in which a part of those operations is carried on ... but I regard as plant the buildings which are more than convenient housing for working equipment and play a part themselves in the manufacturing processes, eg the holding bay for the basic oxygen steelmaking installation as well as the very specialised building which because of its in-built equipment forms part of that installation ...

[112] This court is of the considered opinion that in distinguishing between the functional use and the setting, it must be noted that in some cases, buildings and structures have been held to be plant in their entirety as the courts considered the structures as performing an integral function with the machinery and plant contained within it.

[113] It can be seen from the cases cited above that the meaning given to the word 'plant' is fast developing and expanding. Having no statutory definition, it is not surprising that its meaning will be further expanded and developed. Lord Lowry in the *Scottish & Newcastle* said:

> The word 'plant' has frequently been used in fiscal and other legislation. It is one of a fairly large category of words as to which no statutory definition is provided ('trade', 'office', even 'income' and others), so that it is left to the court to interpret them. It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This is certainly true of 'plant'. No ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant — yet each of these had been held to be so.

[114] The court will now look at some of the local cases submitted earlier:

In the case of *Ketua Pengarah Hasil Dalam Negeri v Resort Poresia Bhd* Civil Appeal No J-01–577 of 2010, the Court of Appeal judges unanimously agreed and maintained the SCIT's decision that the taxpayer cannot claim capital allowance under Schedule 3 of the ITA on the expenses incurred for golf course-turfing and grass. Both the Court of Appeal and the SCIT found that the golf course is a premise in which the business of the taxpayer was carried on and is not a plant.

[115] The tax payer in the case of *Ketua Pengarah Hasil Dalam Negeri v MSDC Sdn Bhd* [2001] 1 MLJ 92 contended that capital expenditure incurred in constructing the training ground used for the purpose of the tax payer's business as driving school for motorcars, lorries etc qualifies for capital allowance. The SCIT allowed the appeal by the tax payer and found that the training ground is an apparatus used in the conduct of the activities of the trade. Furthermore, it is an integral part of tax payer's business. Therefore it is plant within the meaning of Schedule 3 of the ITA 1967. The appeal by the revenue was disallowed by the High Court. However, the Court of Appeal in allowing the appeal by the revenue held that the training ground is not plant, and hence did not qualify for capital allowances.

[116] The Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Tropiland* [2013] AMTC 389 had taken a liberal and holistic approach in determining the word 'plant', using the 'functional test'. At paras 17 and 18, this was what the Court of Appeal said:

> [17] The test of what passes as a 'plant' in *Yarmouth v France* was coined in a general fashion to give the word the widest possible sense. Lindley J had the foresight that a whole host of considerations must be taken into account in determining what is a 'plant' in any given set of facts and that a restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity since the tools or apparatus of a business man for carrying on his business undergo constant changes with passing time and advancing technology. It comes as no surprise then that Lord Lowry in Commissioners of *Inland Revenue v Scottish & Newcastle Breweries Ltd* considered questions such as the particular industry and the taxpayer's own trade in determining what constituted a 'plant' in that case.
>
> There is thus clearly a need to take a holistic approach in every case and look at the taxpayer's business in its entirety instead of taking particular facts in isolation. The need to refrain from viewing the taxpayer's business in a fragmented fashion when determining whether an apparatus is a 'plant' was reinforced by the High Court of Australia in *W Nevill & Co Ltd v Federal Commissioner of Taxation* (1937) 56 CLR 290 where it was held: 'In my opinion the answer to this contention is to be found in a recognition of the fact that it is necessary for income tax purposes, to look at a business as a whole set of operations directed towards producing income'.

[117] It was the appellant/taxpayer's contention that the telecommunication towers are the appellant/taxpayer' plant, ie the apparatus with which it conducts its business. The appellant/taxpayer also contended that its business are carried out with the telecommunication towers. The respondent/revenue on the other hand submitted that in this case, the telecommunication tower functions as a premise for the appellant/taxpayer on which the business of the appellant/taxpayer as a provider and operator of telecommunication towers was carried on, who attached their antennas to the telecommunication towers. The appellant/taxpayer also only provides the telecommunications towers and are responsible for its maintenance but the appellant/taxpayer do not bear any liability if there are any network issues in the service provided by the telecommunication companies.

[118] This court referred to the decision of the SCIT at p 39 of the case stated where the SCIT said:

> The building is thus a structure on which to place the antennas due to its height. The same therefore applies to the telecommunication towers which function as the structure or premises on which the antennas or transmitters are placed. The contention made by the appellant that the telecommunication towers is 'apparatus' cannot be accepted.

[119] At p 41, the SCIT said:

> ... I will hold that telecommunication towers are the premises in which the business of the appellant is conducted, that is, where the actual licensing or letting out space on the telecommunication towers to other telecommunication service providers to attach their antennas takes place, just like the golf course where golf is played on by the members or the training ground where the practice driving takes place or even though the office of the tax payer is elsewhere and not physically on the golf course or on the training ground of the driving institute.

[120] At p 42, the Commissioner/SCIT in considering that to be a 'plant', a structure must be portable and demountable as in the prefabricated dormitories in the Singapore case of *ZF v Comptroller of Income Tax* [2010 SGCA 48, the SCIT said:

> (31) In contrast to this case, even though the appellant had argued that the telecommunication towers are plant, the appellant did not show that the telecommunication towers are portable and demountable and may be re-assembled and used in different configuration elsewhere like the prefabricated dormitories.

[121] At pp 43–44, the SCIT said:

> (33) I find that the appellant cannot bring itself within the ambit of paragraph 2(1) of Schedule 3 of the ITA cited above and the telecommunication towers were not

A the means or apparatus by which the business activities of the appellant were carried on and the true meaning of the word 'plant' should not be stretched beyond its ordinary meaning.

B **[122]** This court after scrutinising the records and looking at all the available evidence holistically and liberally, in conformity with the approach taken by Court of Appeal in the *Tropiland*'s case and also after considering the elaborated submissions by both parties as alluded to in the earlier part of this judgment, had found that the SCIT in arriving at their decision had erroneously decided that the towers were not plant. Before making this finding, this court also had C made critical analysis of all the authorities referred earlier.

[123] As found by the Court of Appeal in *Tropiland*'s case, while it is not open to the High Court, or the Court of Appeal, to overrule or supplement the D findings of fact of the commissioners, the court has jurisdiction to examine whether on the available evidence the commissioners were justified in arriving at the decision they did. Put it in another fashion, this court have jurisdiction to review the commissioner's finding of fact that the telecommunication towers are not plant and to determine if that finding is supported by the available E evidence.

[124] As *Tropiland* is the highest authority to date, this court had followed the approach taken by the Court of Appeal in determining what constitutes a 'plant' that is due consideration must be given to the particular industry F concerned as well as the specific circumstances of the individual taxpayer's own business (see *Inland Revenue Commissioners v Scottish and Newcastle Breweries Ltd* [1982] 2 All ER 230).

G **[125]** This court was of the opinion that further considerations to be taken by the court are that, a liberal and holistic approach should be taken and that a restrictive meaning assigned to the word would have disastrous consequences to business enterprise and economic activity. As such it was the considered opinion of this court that the time has come for the court not to restrict the H meaning of 'plant' as was applied in the various 'tests' such as the 'premise test', 'business test' etc.

[126] Towards this end, this court is inclined to apply the 'functional test' whereby as stipulated in *Tropiland* the court must consider the totality of the I evidence and facts in respect of the functions of the telecommunication towers in the appellants business — ie the 'function test' and 'apparatus' tests.

[127] In that regard, reference was made by the court to the testimony of AW1 which was not challenged during cross-examination:

(a) the appellant's business income is from the licensing of the telecommunication towers to telecommunication service providers who affix their antennas to the telecommunication towers; (see p 6 para 7.2(ii) and p 7 para (IV) of the case stated, and answer 13 of AW1);

(b) the telecommunication towers are the apparatus used by the appellant in the course of its business and from which, the appellant generates its income; (see p 6, para (14) (e) of the case stated and answer 13 of AW1);

(c) the telecommunication towers are used in the permanent employment of the appellant's business and not for any other purposes; (see p 6 para (14)(e) of the case stated and answer 13 of AW1);

(d) without the telecommunication towers, the appellant cannot undertake its business of licensing the telecommunication towers to the telecommunication service providers; (see p 6, para (ii) of the case stated and answer 13 of AW1)

(e) the telecommunication towers are the apparatus with which the appellant carries on its business; (see p 6, para (14)(e) of the case stated and answer 13 of AW1);

(f) the structure of the appellant's telecommunication towers was specifically designed and manufactured by a third party manufacturer; (see p 7, para (IV) of the case stated and answer 21 of AW1);

(g) the materials involved in manufacturing the telecommunication towers plays an important role. The telecommunication towers are specially designed and are able to withstand strong wind and harsh weather and to withstand the weight of the antennas. They are manufactured and installed for the purpose of the appellant's business; (see p 7, para 14(d) of the case stated and answer 21 of AW1);

(h) the telecommunication towers are designed at a certain height to help enhance telecommunication connectivity and coverage of the equipments installed (see p 17, para (iv) of the case stated and answer 21 of AW1); and

(i) the telecommunication towers are purpose manufactured towers for the appellant's business, *with which* the appellant conducts its business. The telecommunication towers have no other purpose other than this (see pp 124 and 235 of D1 and answer 21 of AW1).

[128] This court had made full analysis of all the available facts based on all the available evidence adduced and the agreed facts, and did find that the line between the means by which the business was conducted ('the business test') and the premises in which the business was conducted was indeed a thin one and was capable of being determined either way.

[129] In arriving at its conclusion, this court was also of the considered view that the SCIT had erred when it failed to consider all the primary facts and to draw inferences from them before making its findings. Consequently, it had erred in its decision in failing to take into account of the respondent's lack of consideration of the entire business operations of the appellants in holistic manner, particularly on the functions, specific circumstances and purposes of the purpose-built towers, and as adopted by the Court of Appeal in *Tropiland*.

[130] This court was also of the considered opinion that using the 'functional test' in *Dixon (Inspector of Taxes) v Fitch's Garage Ltd* [1975] 3 All ER 455; [1975] 50 TC 509 would add more cogency to this court's reasoning.

[131] In that case, Brightman J had used the 'functional' test to determine whether the canopy helped the company to perform the activity of supplying petrol to motor vehicles by asking 'does the canopy help to supply petrol?' In the same vein, this court had asked: 'Did the telecommunication towers help the company to run its business of licensing the telecommunication towers to the telecommunication service providers?' The answer was patently clear to be in the positive. The appellant's business income was derived from the licensing of the telecommunication service providers who had affixed their antennas on the telecommunication towers. Hence the telecommunication towers were found to be plants.

[132] As was observed earlier, unlike the canopy, the towers were particularly purpose-manufactured to conduct its business, and from which it derived its income. Without the telecommunication towers, the business of the appellant could not function or be conducted, which unlike the canopy, the business of supplying petrol could still go on.

CONCLUSION

[133] In conclusion, for the first issue of the time-barred assessments, this court found the decision of the SCIT that the notices of assessment for the years 2003 and 2004 were not time-barred was wrong in law as the court did not find the appellant negligent in submitting the said tax returns. The decision of the SCIT was accordingly set aside.

[134] On the second issue of the entitlement to claim capital allowance, the court had found the decision of the SCIT that the appellant/taxpayer was not entitled to claim capital allowance from the years 2003–2008 was also wrong in law as the telecommunication towers were found to be the plant of the appellant with which it had carried on its trade. The decision of the SCIT on this issue was accordingly set aside.

[135] In the upshot, this court made the following orders:

(a) the appeal of the appellant was allowed with cost of RM8,000;

(b) the decisions of the learned SCIT on both issues were set aside;

(c) the notices for the YA 2003 and 2004 were null and void and were set aside; and

(d) the claim for the capital allowances by the appellant for the YA 2003–2008 were allowed.

Order accordingly,

Appeal allowed with costs of RM8,000 and decision of learned SCIT set aside.

Reported by Dzulqarnain Ab Fatar